

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION, et al.,

Respondents.

Case No. C15-102RSM

ORDER DENYING MOTIONS FOR
LEAVE TO FILE AMICUS BRIEFS

This matter comes before the Court on Motions for leave to participate as *amicus curiae* filed by: the Chamber of Commerce of the United States of America (the “Chamber”), Dkt. #152; the Software Finance and Tax Executives Council, National Foreign Trade Council, Financial Executives, Information Technology Industry Council and National Association of Manufacturers (together, the “Amici Group 1”), Dkt. #155; and the Silicon Valley Tax Directors Group, the Semiconductor Industry Association, the Computing Technology Industry Association, the Information Technology Industry Council, and TechNet (together, the “Amici Group 2”), Dkt. #165.

On September 7, 2016, the Court entered a Stipulation setting page limits and a revised briefing schedule for “Briefing Specific Production Requests Still in Dispute.” *See* Dkt. #137. This Order allows Microsoft and the Government 24 pages each for briefing, with Microsoft

1 granted an additional 12 pages on Reply. *Id.* at 3. Microsoft's opening brief was due on
2 September 12, 2016, and the Government was granted 30 days to respond, with Microsoft
3 granted 15 days to reply. *See* Dkt. #137.

4 On September 12, 2016, Microsoft filed its opening Brief Regarding Privileged
5 Documents Still in Dispute. Dkt. #140. 30 days later, the Government filed its Response. Dkt.
6 #147. The instant Motions for leave to file amicus briefs were filed two weeks later. Microsoft
7 opposes none of these amicus briefs; they are all opposed by the Government.

9 The Chamber, Amici Group 1, and Amici Group 2 each filed their respective Motions
10 on the same day, October 27, 2016. Dkts. #152, #155, #165. These Motions are brought
11 "[p]ursuant to Federal Rule of Civil Procedure 7(b)," under the Court's "inherent authority," or
12 at the Court's "broad discretion." *See id.* The Chamber argues that "[t]he issues and policy
13 implications of this case are deeply concerning to the Chamber and its members, and the
14 Chamber is uniquely situated to address the government's arguments." Dkt. #152 at 4. Amici
15 Group 1 argues that they can offer additional important viewpoints on the matter and that "the
16 United States advocates for an interpretation of the term 'promotion' in Code section
17 7525(b)(2) that is so broad and overreaching that, if accepted, it would cause a chilling effect
18 and vitiate the open and candid communications that need to occur so taxpayers can obtain
19 accurate tax advice..." Dkt. #155 at 3. Amici Group 2 argues that they have an interest in the
20 outcome of this case because they have member companies that "frequently seek tax legal
21 advice regarding cost sharing and related tax legal issues... [and] rely on the tax practitioner
22 privilege of Internal Revenue Code § 7525..." Dkt. #165 at 3. Amici Group 2 argues that they
23 "have reviewed the briefs filed to date in this case and believe the Court would benefit from
24 [their] perspective on the complexity of cost sharing arrangements and U.S. international tax
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1 rules, and the crucial role the tax practitioner privilege plays in enabling technology companies
2 to obtain effective assistance from their tax advisors.” *Id.* at 3-4.

3 On November 7, 2016, the Government filed a single Response to all three Motions.
4 The Government argues that the proposed amicus briefs, “together totaling 36 pages, serve no
5 purpose other than to bolster positions taken by Microsoft and KPMG, and, when combined
6 with the Microsoft and KPMG filings, effectively sidestep the page limits to which Microsoft
7 stipulated for this round of briefing.” Dkt. #179 at 1. The Government argues that the parties
8 have so far conformed to the strict page limits set forth by the Court, *supra*, but that this was at
9 the exclusion of more detailed analysis and that the Government has more to say in oral
10 argument. *Id.* at 2. The Government argues that the amicus briefs “advocate for positions
11 asserted by Microsoft,” and have a “divide-and-conquer strategy that implies some
12 coordination among the filers.” *Id.* at 2-3. The effect of this is to “expand the page limits for
13 advocacy in support of Microsoft’s privilege claims by thirty-six pages.” *Id.* at 3. The
14 Government, like the proposed amici, acknowledges that “Ninth Circuit precedent affords a
15 federal district court ‘broad discretion’ to permit amici briefing. *Id.* (citing, *inter alia*,
16 *Microsoft Corp. v. United States Dept. of Justice*, No. C16-0538JLR. 2016 WL 4506808, at *9
17 (W.D. Wash. Aug. 29, 2016)). The Government argues that “[i]n evaluating the utility of amici
18 brief, the Court has considered in the past the following two factors: (1) whether the amici have
19 ‘unique information’ or a unique perspective regarding an issue; or (2) whether the legal issues
20 involved have potential ramifications beyond the parties directly involved. *Id.* at 4 (citing
21 *Skokomish Indian Tribe v. Goldmark*, No. C13-5071JLR, 2013 WL 5720053, at *1 (W.D.
22 Wash. Oct. 21, 2013)). The Government first argues that “no ‘unique’ information unavailable
23 to Microsoft and KPMG is presented in the proffered briefs, and no unique ‘perspective’ is
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1 provided or needed to resolve this discovery dispute.” *Id.* The Government next argues that
2 the instant Motions are untimely. *Id.* at 4-5 (citing *Microsoft Corp. v. United States Dept. of*
3 *Justice*, 2016 WL 4506808, at *9; Federal Rule of Appellate Procedure 29(e)).

4 Only the Chamber filed a Reply brief. The Chamber acknowledges that “the Court may
5 allow or deny additional briefing from the government as it sees fit...” Dkt. #181 at 1. The
6 Chamber argues that the Government’s complaint of additional pages in support of Microsoft
7 would be standard practice for cases with amicus briefing, but the Chamber does acknowledge
8 that it “sought to avoid duplication” with the other proposed amici. *Id.* at 2. The Chamber
9 does not argue that its brief was untimely, but argues that it could not have filed its brief until
10 after the Government’s brief, and that therefore the use of Federal Rule of Appellate Procedure
11 29(e) “is entirely inapt.” *Id.* at 3.

14 The Court has reviewed the arguments of the proposed amici and the Government.
15 Because the instant Motions were all filed on the same date, avoid overlapping issues, and
16 because the Chamber acknowledges coordinating with the other proposed amici, the Court
17 generally agrees with the Government’s view that these proposed briefs were intended to
18 “effectively sidestep the page limits.” The Court further finds that the proposed amici do not
19 have sufficiently unique perspectives or unique information to warrant granting leave to greatly
20 expand the briefing, and are simply attempting to bolster Microsoft’s existing positions. The
21 Court agrees with the Government that Microsoft and KPMG have more than adequate counsel
22 and resources to advocate on their own behalf. Given all of this, under the Court’s broad
23 discretion, it will deny leave to file the proposed amicus briefs.

26 Having reviewed the relevant briefing and the remainder of the record, the Court hereby
27 finds and ORDERS that the Motions for leave to participate as *amicus curiae* filed by the
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1 Chamber, Dkt. #152, the Amici Group 1, Dkt. #155, and the Amici Group 2, Dkt. #165, are
2 DENIED.

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4 DATED this 14 day of November, 2016.

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8 RICARDO S. MARTINEZ
9 CHIEF UNITED STATES DISTRICT JUDGE
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